IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI

STIM, LLC,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No.: 4:15-cv-00772-ODS
	)	
AECOM TECHNICAL SERVICES, INC.	)	
	)	
Defendant.	)	

AECOM TECHNICAL SERVICES, INC.'S
OMNIBUS MOTION IN LIMINE

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I. INTRODUCTION

Pursuant to the Scheduling and Trial Order, AECOM Technical Services, Inc. ("AECOM") submits this Omnibus Motion in Limine. AECOM anticipates that STIM may refer to or attempt to introduce evidence or argument concerning:

(1) Incentive benefits that AECOM allegedly "could have" received;

(2) A damages spreadsheet that was not disclosed in response to AECOM's interrogatory;

(3) Speculation about AECOM's motives;

(4) Exhibits that misleadingly combine or omit pages of documents relative to how they were produced; and

(5) Summary comments and paraphrasing of other witnesses' testimony that is not in evidence, or mischaracterization of prior testimony.

AECOM seeks the exclusion of such evidence and argument as being irrelevant, unduly prejudicial to AECOM, and misleading to the jury.

II. LEGAL STANDARD

Under the Federal Rules of Evidence, "[t]he court must decide any preliminary question about whether . . . evidence is admissible." Fed. R. Evid. 104(a). The Court plays a critical role at this stage of the proceedings by ensuring that the issues at trial are properly framed and that the evidence presented on those issues is limited to what is admissible. The Court has wide discretion in performing this "gatekeeping" function. *Shelton v. Kennedy Funding, Inc.*, 622 F.3d 943, 957 (8th Cir. 2010) ("A district court enjoys wide discretion in ruling on the admissibility of proffered evidence, and evidentiary rulings should only be overturned if there was a clear and prejudicial abuse of discretion.") (quotation omitted);

Callanan v. Runyun, 75 F.3d 1293, 1297–98 (8th Cir. 1996) (affirming district court's exclusion of testimony).

The touchstone of admissibility is relevance. Relevant evidence is evidence having any tendency to make a fact of consequence "more or less probable than it would be without the evidence." Fed. R. Evid. 401. Irrelevant evidence is not admissible. Fed. R. Evid. 402. Nor is all relevant evidence admissible; relevant evidence may be excluded under Rule 403 if "its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, [or] misleading the jury . . . ." Evidence is unfairly prejudicial if it tends "to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." *Firemen's Fund Ins. Co. v. Thien*, 63 F.3d 754, 758 (8th Cir. 1995) (quotation omitted) (affirming district court's exclusion of evidence as unduly prejudicial under Rule 403); Fed. R. Evid. 403 advisory committee's note. When evidence may cause a jury to decide the case on something other than the propositions set forth, a court may find that evidence to be unfair. *Firemen's Fund*, 63 F.3d at 759–60; *see also Hicks v. Mickelson*, 835 F.2d 721, 726 (8th Cir. 1987) (affirming exclusion of evidence that would have caused "the jury to lose sight of the essential issue in the case").

III. ARGUMENT

1. STIM Should Not Be Allowed to Present Evidence or Argument Concerning Incentive Amounts That AECOM Allegedly "Could Have Received"

AECOM moves to exclude any evidence or argument presented for the purpose of supporting a damages theory related to incentive amounts that AECOM allegedly "could have," but did not, obtain. Such evidence is irrelevant, would serve to confuse the jury, and would be unduly prejudicial.

AECOM has previously demonstrated that the Consulting Agreement's plain terms—including the third sentence of Paragraph 11—do not entitle STIM to recover 25% of incentives that AECOM *never* obtained and used. *See* dkt. 123 at 30–32; dkt. 142 at 8–9 & n.5.[1] STIM continues to refer to this theory of damages, but it has failed to offer any evidence or argument that the Consulting Agreement entitles STIM to such compensation. In short, there is none. The Consulting Agreement's "Compensation and Payment" provision states that a "fee is due" to STIM only after AECOM has "obtained" and "used" a relevant benefit, and nothing in the termination provision enlarges STIM's recovery to encompass 25% of benefits that AECOM never obtained.

Through the course of discovery and the summary judgment briefing, STIM has identified several categories of evidence intended to help establish the amount of benefits AECOM allegedly "could have" obtained had it not terminated the Consulting Agreement. These include Robert Mandel's excel spreadsheets, the inchoate proposal letters from Colorado and Missouri, and documents from the "Good Jobs First" database purporting to show incentives that other companies have received from various states in the past. Although some of this evidence—such as early versions of the spreadsheets that STIM presented to AECOM during the course of their relationship—may be relevant to factual matters other than STIM's alleged damages, STIM should not be allowed to use such evidence at trial to support a prayer for damages based on a 25% fee of amounts AECOM "could have obtained." Nor should STIM be allowed to offer any evidence whose sole relevance relates to such a damages theory.[2] Any such evidence is irrelevant and could only serve to confuse the jury and unduly prejudice AECOM; therefore, it must be excluded. *See* Fed. R. Evid. 402 ("Irrelevant evidence is not admissible").

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[1] AECOM expressly incorporates those arguments in this Motion. This question of law is ripe for the Court's resolution on the basis of the parties' briefing in support of and in opposition to the summary judgment motions.

[2] This includes Deposition Exhibit 130, an incentive spreadsheet that was never presented to AECOM during the course of STIM's contractual relationship, as well as documents from the "Good Jobs First" database or other incentives-related research that was obtained after litigation was pending.

2. STIM Should Not Be Allowed to Rely on Deposition Exhibit 130

STIM's Deposition Exhibit 130—a spreadsheet of incentive estimates that STIM did not produce until Robert Mandel's deposition on July 19, 2016—cannot be offered at trial as a basis for STIM's damages. *See* Ex. A (Depo. Ex. 130). In addition to being irrelevant and therefore inadmissible for the reasons given in Section 1 above, Deposition Exhibit 130 should be excluded for the alternative reason that STIM failed to disclose it as a basis for its damages calculation in response to AECOM's Interrogatory No. 1. *See* Ex. B (Depo. Ex. 127 at 2–3). Even after Robert Mandel admitted in his deposition that STIM had not disclosed Deposition Exhibit 130 in its interrogatory responses, STIM still failed to supplement its interrogatory responses as required by Federal Rule of Civil Procedure 26(e)(1). Therefore, STIM should be precluded from offering it at trial. *See* Fed. R. Civ. P. 37(c)(1).

3. Robert Mandel Should Not Be Allowed to Testify Concerning AECOM's Alleged Motives

Robert Mandel's deposition testimony contains numerous statements speculating about AECOM's supposed motivations in terminating the Consulting Agreement or taking other actions related to STIM. *See, e.g.*, Ex. C (Mandel Tr. at 111:20–25) ("[AECOM] just did not want to pay the money. They wanted to renegotiate the terms so they wouldn't have to pay as much."), *id.* at 139:7–21 ("It looks like [Donna Cote] puts that language [about authorization from a Tax Representative] in [the Consulting Agreement] to say, well, we can always find a way to weasel out of this if we need to that [sic] with that tax rep language."), *id.* at 152:16–153:4 ("So after they checked me out and found out I was an individual person they decided to say, okay, we'll just cancel this contract."), *id.* at 194:5–8 ("But they purposely wanted to breach the contract to save money."), *id.* at 356:2–21 ("[The proposed new agreement on September 30, 2014] is not something they ever intended to have me sign"). Such groundless speculation is inadmissible regardless of whether Mandel is testifying as a lay witness or expert witness.

All lay testimony must be "rationally based on the witness's perception." Fed. R. Evid. 701. Because Mandel was not privy to AECOM's internal discussions concerning the termination of the Consulting Agreement, he has no personal knowledge of those discussions and cannot speculate about AECOM's motivations. *See, e.g., Hosse v. Sumner Cnty. Bd. of Educ.*, No. 3:13 C 520, 2016 WL 1449220, at *2 (M.D. Tenn. Apr. 13, 2016) (collecting cases holding that lay opinion is inadmissible where witness "'possesses no personal knowledge or perception as to the underlying motivation for'" a party's decision); *Reynolds v. Family Dollar Servs., Inc.*, No. 09-56-DLB, 2011 WL 618966, at *3 (E.D. Ky. Feb. 10, 2011) ("[I]t is simply improper for Plaintiff to offer a witness such as Perez to testify to his general opinion—based purely on subjective and speculative impressions—concerning Defendant's motivation for not promoting and subsequently terminating Plaintiff.").

To the extent STIM intends to offer Mandel as an "expert" concerning AECOM's motive for terminating the Consulting Agreement, such testimony must be excluded for the same reason. An expert, just like a lay witness, cannot offer speculation about the motives of others. *See DePaepe v. Gen. Motors Corp.*, 141 F.3d 715, 720 (7th Cir. 1998); *In re Rezulin Prods. Liab. Litig.*, 309 F.Supp.2d 531, 546–47 (S.D.N.Y. 2004).

Additionally, Mandel, who attended many depositions in this case, also exhibited a tendency to comment on or characterize other witnesses' deposition testimony during his own deposition. *See* Ex. C (Mandel Tr. at 111:18–24, 146:12–147:5, 219:12–20, 231:21–232:5). In one instance, Mandel even accused an AECOM employee of committing perjury during his deposition, without any substantiating evidence. *Id.* at 153:17–154:20. Such comments questioning the veracity of a witness, like Mandel's speculation about AECOM's motives, are improper and should be precluded at trial.

4. STIM Should Not Be Allowed to Introduce Deposition Exhibits 53, 54, 180 or Other Exhibits Improperly Combining or Altering Documents

In the course of its eight depositions of AECOM employees, STIM introduced a number of deposition exhibits that improperly combine separate documents, omit material pages, or both, causing the exhibits to be incomplete and misleading. Three exhibits in particular should be excluded as intentionally misleading.

First, in its summary judgment briefing, STIM's Exhibit 61 combines a parent email (AE_001080) with the attachments from a *different* email (AE_001093–94), in an attempt to portray the attachments as being a "proposal" referenced in the mismatched parent email. STIM did the same thing in its Deposition Exhibit 180.[3] *See* Ex. D (Depo. Ex. 180). This is highly prejudicial and a *knowing* misrepresentation of the record, as shown by the fact that AECOM has corrected STIM's error twice already—and is still being ignored. *See* dkt. 154, AECOM's Consol. Stmt. of Facts in Supp. of Mot. for Summ. J., at 151–53. AECOM's Deposition Exhibit 177 represents the proper, complete email with its attachments, and this Court should exclude any attempt by STIM to introduce its false version at trial.

Second, STIM's Deposition Exhibit 53 improperly combines an incomplete version of Missouri's October 2014 incentive proposal letter (produced by AECOM) with a purported incentive calculation performed *privately* by Robert Mandel (and produced by STIM), in an attempt to make it appear as though the State of Missouri estimated that AECOM could recover $25 million in incentives from the program described in its letter. In reality, Missouri's own estimate of potential incentives—contingent on meeting certain hiring conditions—was only

[3] In all respects other than the presence of a deposition exhibit sticker, STIM's Summary Judgment Exhibit 61 is identical to its Deposition Exhibit 180, so for purposes of this Motion AECOM treats them as the same.

$648,648. Additionally, STIM omitted a section from the Missouri letter that described in more detail all the "Next Steps" that would be necessary in order to pursue incentives in Missouri. *Compare* Ex. E (Depo. Ex. 53) *with* Ex. F (Depo. Ex. 176). This misleading compilation of separate documents from separate sources would be certain to confuse the jury.

Third, STIM's Deposition Exhibit 54 presents an incentive proposal letter from Colorado, combined with marginal notes added by Robert Mandel purporting to calculate the amount of incentives AECOM allegedly could obtain if URS employees were included in Colorado's proposal. *See* Ex. G (Depo. Ex. 54). This URS-based calculation does not derive from any information in Colorado's letter (which does not mention URS employees) and Mandel does not provide the factual basis for his calculations. Separately, for non-URS employees, Mandel's notes miscount the total amount of proposed incentives listed on the face of the letter. Mandel's sum combines estimates from two programs that the letter plainly describes as mutually exclusive options. *Cf.* dkt. 142-1 at 79–80 (explaining errors in Mandel's description of the Colorado letter). Notwithstanding these errors, during deposition questioning STIM's counsel referred to Mandel's notes in Deposition Exhibit 54 as though they were part of the letter itself. *See* Ex. H (Rudd Tr. at 54:21–55:24); Ex. I (Burke Tr. at 42:21–43:8). STIM appeared to argue the same in its Motion for Partial Summary Judgment and Robert Mandel's accompanying declaration. *See* dkt. 127 ¶ 170; dkt. 128-2 ¶ 20. Thus, Mandel's handwritten, unsupported, and demonstrably faulty calculations are intended to mislead, and likely *will* mislead the jury if this exhibit is not excluded. Mandel's notes are not part of Colorado's letter. Therefore, STIM should be prohibited from offering this exhibit at trial.

STIM also submitted many other deposition exhibits that mistakenly combine, omit, or alter pages from the form in which they were produced during discovery.[4] AECOM will address these modified exhibits, if necessary, at trial.

For the reasons stated above, Deposition Exhibits 53, 54, and 180 should be excluded under Federal Rules of Evidence 106 and 403 because they are incomplete, mischaracterize the record, and are likely to confuse the issues and mislead the jury.

5. STIM's Counsel Should Not Be Allowed to Comment on Other Witnesses' Testimony or Facts Not in the Record

During questioning at depositions and hearings with the Court, STIM's counsel revealed a tendency to improperly comment on and paraphrase the testimony of witnesses who were not present, resulting in repeated misrepresentations of the record. In some cases, the mischaracterizations led to improper and inflammatory comments about the witness whose testimony counsel mischaracterized. For example, in the deposition of Nina Desrocher, STIM's counsel represented to Ms. Desrocher that AECOM's chief information officer, Tom Peck, had earlier testified that "he could not recall whether AECOM, in fact, had any subsidiaries or not." Ex. J (Desrocher Tr. at 18:14–18). Counsel followed up that improper comment by asking Desrocher "whether Mr. Peck got his job and keeps his job because he's related to somebody high in the company." *Id.* at 19:1–12. In reality, Mr. Peck had testified only that he was not aware of the "names and titles" of AECOM's subsidiaries. *See* Ex. K (Peck Tr. at 10:7–10). STIM's counsel repeated this false characterization of Peck's testimony in Donna Cote's deposition. *See* Ex. L (Cote Tr. at 78:13–14).

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[4] *See, e.g.*, Depo. Exs. 12, 15, 18, 19, 20, 23, 24, 27, 31, 33, 35, 36, 37, 38, 39, 40, 41, 42, 46, 48, 49, 50, 59, 64, 68, 70, 73, 78, 82, 83, 85, 86, 90, 99, 114, 115. STIM also mistakenly labeled two different documents as Deposition Exhibit 114 in two different depositions. The exhibit to which AECOM refers in this footnote is the document labeled Deposition Exhibit 114 in the deposition of Troy Rudd.

In other cases, such mischaracterizations were intended to mislead the witness being questioned. For example, in the deposition of Michael Burke, STIM's counsel alluded to Donna Cote's prior deposition testimony and represented that "Donna Cote said, 'That would have been fine if we were talking about a few hundred thousand, but you're going to be making too much money if in fact your compensation is going to be . . . 25 percent of $100 million. That's going to be too much money.'. . . I mean that's what she testified." Ex. I (Burke Tr. at 69:12–70:12). In reality, Cote had *denied* the very claim that STIM's counsel later attributed to her. STIM's counsel had asked Cote whether "if [STIM's] performance were worth tens of millions of dollars, STIM was by virtue of its 25 percent contingency really going to be getting too much money." Cote replied, "*I don't think it was a getting too much money discussion.* The other part of the contract is the scope of work needed to be focused and specific to deliverables that Rob [Mandel] was going to be providing to us needed [sic] to be in a phased approach." Ex. L (Cote Tr. at 201:11–22) (emphasis added).

Such methods of questioning improperly distort testimony in ways that are likely to confuse and mislead the jury (or the witness being questioned), or create false and prejudicial inferences about AECOM's employees. STIM's counsel should be precluded from referring to facts or testimony that is not in the record, and from commenting on, characterizing, or paraphrasing other witnesses' testimony. *See Skogen v. Dow Chem. Co.*, 375 F.2d 692, 704 (8th Cir. 1967) (classifying counsel's questions that "assumed facts not in evidence" as "objectionable"); *Price v. Code-Alarm, Inc.*, No. 91 C 699, 1992 WL 390895, at *3 (N.D. Ill. Dec. 16, 1992) (granting motion in limine precluding counsel from "incorporating into his questions of witnesses his own characterization of the testimony of other witnesses"); McCormick on Evidence, § 7 (7th ed., 2016 pocket part) ("Another common form problem occurs when the examiner words the question so that it assumes as true matters which no witness has yet testified to, and which are disputed between the parties.”).

IV. CONCLUSION

For the reasons stated above, the Court should exclude any evidence, argument, or testimony relating to (1) incentive amounts AECOM “could have” received; (2) STIM’s Deposition Exhibit 130; (3) speculation about AECOM’s motives in terminating the Consulting Agreement or taking other actions; (4) STIM’s Deposition Exhibits 53, 54, and 180; and (5) summary comments and paraphrasing of other witnesses’ testimony that is not in evidence, or mischaracterization of prior testimony.

Dated: November 23, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of November, 2016, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ Daniel E. Blegen
Attorney for Defendant